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Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PEOPLE FOR THE AMERICAN WAY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

People For the American Way is a member-based, nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. It was founded in 1980 by religious, civic and education leaders devoted to the Nation's heritage of tolerance and pluralism and has 277,000 members nationwide. The organization's primary mission is to educate the public on issues of vital importance to our democratic tradition and to resist attacks from those who would impose narrow sectarian constraints on our free society.

People For the American Way is strongly committed to public education in order to promote the American tradition of free thought and worship and to preserve it for the generations to come. In particular, the organization believes that public schools can achieve their goal of preparing students to meet the challenges of a complex and demanding society only by fostering

students' intellectual curiosity and personal responsibility for resolving the issues that affect their lives.

A basic tenet of People For the American Way is that genuine First Amendment expression in schools must be free from sectarian pressures by school authorities aimed at promoting undesirable conformity, and that intellectual discussion is strengthened when students draw upon diverse backgrounds and philosophies. For this reason, the organization has actively participated in public debate and litigation concerning excellence and values in public education.

Because the decision of the court of appeals in this case could thwart public secondary schools from carrying out their educational mission by introducing religious activities into the schools as part of officially sponsored student activity programs, People For the American Way respectfully submits this brief as *amicus curiae* in support of petitioners.

CONSENT OF THE PARTIES

The United States has consented in writing to the filing of this brief as *amicus curiae*. A copy of that consent letter is being filed with this brief. All other parties filed a blanket consent letter on July 15, 1989 authorizing any party to file a brief as *amicus curiae*.

SUMMARY OF ARGUMENT

This case involves the proper interpretation of the Equal Access Act, 20 U.S.C. §§ 4071, *et seq.* ("EAA" or "Act"), enacted by Congress in 1984 to reconcile the competing interests of three fundamental rights protected by the First Amendment: the free exercise of religion, free expression, and the prohibition of establishment of religion. By according the EAA an extremely broad reading required neither by its language nor legislative history, the Court of Appeals for the Eighth Circuit sharply increased the risk of public school entanglement with religion in violation of the Establishment Clause and significantly curtailed traditional

school district discretion in defining the scope, content, and structure of its curricula as they relate to officially approved student activities.

Under the EAA, a public secondary school which receives federal funds and has a "limited open forum" may not deny access to school premises for meetings by noncurriculum-related, student-initiated groups on the basis of the "religious, philosophical, or other content of the speech at such meetings." A limited open forum exists under the Act "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b).

While the statute does not expressly define "noncurriculum related," the meaning of the term can readily be discerned from the legislative history. First, Congress did not require public secondary schools to create limited open forums. It left that determination to the discretion of school authorities. Second, Congress granted a right of equal access only if school authorities actually established a limited open forum. The congressional aim was to assure nondiscriminatory access by noncurriculum-related student groups, including student religious groups, to an established open forum. Third, while the congressional floor debates do contain particular legislators' assessments as to whether specific activities are curriculum or noncurriculum-related, the legislative history as a whole demonstrates that Congress was not attempting to supplant the traditional discretion of school authorities in defining a school's curriculum.

The Eighth Circuit misread congressional intent when it gave binding effect to an individual legislator's personal laundry list of curriculum and no icurriculum-related activities instead of recognizing that the classification of activities is a case-by-case factual determination based on the degree of official sponsorship and direction of each activity. Unlike the district court in this case and the Ninth Circuit in *Garnett* v. *Renton Area School District No.*

403, 874 F.2d 608 (9th Cir. 1989), the court of appeals erroneously based its classification on whether an activity has a counterpart in the school's formal course curriculum.

Moreover, the Eighth Circuit's construction raises unnecessary constitutional concerns. By defining "noncurriculum related student groups" in terms of relationship to the formal course curriculum rather than faculty sponsorship and involvement in the activity, the court of appeals created an untenable constitutional dilemma for schools, such as the Westside High School in this case, which maintain a policy of faculty sponsorship and control over all student activities. At such schools, the student body well understands that the activities program is sponsored and controlled by the school administration, and the admission of a student religious group to the activities program creates the reasonable inference that the religious club, like other student clubs, has official approval and endorsement. Such official endorsement of a religious activity, however, is prohibited by the Establishment Clause. *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. ___, 109 S. Ct. 3086, 3101 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).

Congress, to be sure, sought to minimize this risk of official involvement with student religious groups by confining the school administration's role to custodial supervision. *See* 20 U.S.C. § 4071(c)(3). But in the face of a statute whose aim is equal access—that is, access for religious groups on the same terms and conditions as other nonreligious, noncurriculum-related student groups—the conclusion is inescapable that a religious activity will be reasonably understood to have the same official imprimatur that the other approved student activities have at Westside High School.

ARGUMENT

I.

THE EAA DOES NOT SUPPLANT SCHOOL AUTHORITY DISCRETION IN DEFINING PUBLIC SECONDARY SCHOOL CURRICULA OR THE RELATIONSHIP BETWEEN THOSE CURRICULA AND OFFICIALLY SANCTIONED STUDENT ACTIVITIES.

In its decision below, the court of appeals concluded that Westside High School authorities had created a "limited open forum" for purposes of the EAA[1] by maintaining "many [noncurriculum related] student clubs at WHS, including the chess club. . . ." Pet. App. A at 14.[2] In reaching this conclusion, it rejected the school board's contention, upheld by the district court, that "those clubs which are currently permitted to utilize the facilities at Westside High School are curriculum related and tied to the educational function of the institution" (Pet. App. B at 25-26), and that the school had not created nor intended to create a limited open forum (Pet. App. A at 11-12). By rejecting these crucial findings, the court of appeals substituted its judgment on the nature of Westside High School's student activities program and held that the school had improperly refused to grant "equal access or a fair opportunity" to students seeking formal recognition of a Bible Study Club. The court reached this conclusion by

1. The EAA provides in relevant part:

> (a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited
>
> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.
>
> (b) "Limited open forum" defined
>
> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

20 U.S.C. § 4071(a)-(b).

2. "Pet. App." refers to the appendices to the Petition for Writ of Certiorari.

selectively examining the statute's legislative history and concluding that Congress intended the term "noncurriculum related student groups" to encompass a broad range of activities regardless of the particular school's policy or practice toward student activities or the degree of faculty involvement in sponsoring and administering those activities.

The Eighth Circuit's construction of the statute misreads congressional intent and places school districts in an educational straightjacket by failing to recognize that public schools carry out their curricular mission not merely in the formal classroom setting, but also in the informal setting of student activities. By quoting in isolation one senator's attempt to illustrate which activities are curriculum-related and which are not, the court appeared to adopt the simplistic notion that only activities linked to a formal course were to be classified as curriculum-related. One effect of the court of appeals' decision will be to place at risk public schools which approve innovative or experimental student activities which have no precise counterpart in the formal education course materials. The risk is that their innovative activities programs may be deemed to constitute limited open forums, even though the school did not intend to establish such forums. The court overlooked the recurrent themes in the legislative history (1) that discretion to define the scope of the curriculum was retained by the school authorities, (2) that schools were free to establish or terminate a limited open forum, and (3) that the classification of an activity as curriculum or noncurriculum-related was based on the nature of faculty sponsorship and direction of the activity.

A. Congress Defined Noncurriculum-Related Student Activities as Those Which Lack Official Sponsorship or Direction.

The structure and legislative history of the Act demonstrate that Congress never intended to limit a school's discretion in defining its curriculum or to impose conditions upon any school using nonformal or nontraditional educational methods. Although the term "noncurriculum related student group" is not

expressly defined in the statute,[3] the legislative history provides clear guidance for defining the term. Senator Hatfield, the sponsor of the floor amendment that ultimately became the EAA, indicated that the classification of an activity as curriculum or noncurriculum-related depended on existence of faculty sponsorship, direction and supervision of the activity. In response to a question from Senator Gorton, Senator Hatfield agreed that, "if the school district were to determine that the girls cheerleading squad . . . should be led by a teacher, it could make the determination that it was curriculum-related." 130 Cong. Rec. S8342 (daily ed. June 27, 1984). In further response to Senator Gorton, Senator Hatfield agreed that the football team also was curriculum-related because "[t]he coaches are hired by the school administration" and they often "teach health classes" as members of the physical education department. *Id.* Other examples of curriculum-related activities mentioned by Senator Hatfield were a French or Spanish club, a drama club, and a school band. *Id.*

Senator Gorton then asked whether a key for distinguishing between curriculum and noncurriculum-related activities is school sponsorship.[4] Senator Hatfield agreed, explaining that sponsorship refers to "official participation, . . . the directing of that activity, and the leading of that activity, and the orchestrating of that activity." *Id.*

It is true, as the court of appeals noted (Pet. App. A at 13-14), that Senator Hatfield described a chess club as noncurriculum-

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3. Arguably, the text of the EAA does provide some guidance as to what constitutes a "noncurriculum related" student group. A school will be deemed to "offer a fair opportunity" for a noncurriculum-related group to meet, which thereby triggers the Act, if the meeting is voluntary and student-initiated and there is no sponsorship of the meeting by the school, the government, or its agents or employees. 20 U.S.C. § 4071(c)(1)-(2). Thus, a limited open forum could exist only where the existing student activities are voluntary and student-initiated and enjoy no school or government sponsorship. Otherwise, access under the Act would be unequal, rather than equal, access as intended by Congress.

4. "It seems to me, and I wish the Senator would correct me if I am in error, that one of the keys to the noncurriculum-related student organization is that it is not sponsored by the school." 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Gorton).

related, but the colloquy with Senator Gorton demonstrated that what is dispositive is not whether the activity has a direct counterpart in the formal curriculum of the school, but whether the school assigns a faculty member or school employee to participate in the activity beyond a custodial role. 130 Cong. Rec. S8342-43. Indeed, Senator Hatfield acknowledged this with respect to all noncurriculum-related activities—nonreligious as well as religious. *Id.* at S8343.

The Senate debate plainly demonstrates that no bright lines exist and that the relationship of various student activities to a school's curriculum depends upon the particular facts of the school. A chess club, for example, may have as much of a relationship to mathematics or science as a football team or cheerleading squad has to physical education. It may be no more or less voluntary. It may have no more or less the imprimatur of school sponsorship, especially if the young chess players represent their schools in interscholastic competition.[5]

Thus, the court of appeals was plainly wrong in relying on Senator Hatfield's *ad hoc* classification of a hypothetical chess club in its characterization of the Westside High School chess club and in ignoring the classification standards Senator Hatfield expressed. The district court, after receiving testimony from school officials, found that

> the facts do not establish that WHS has a policy or practice of "indiscriminate use" of its facilities by student organizations or the general public. In fact, WHS has only sparingly permitted, outside of the classroom setting, the use of school facilities for political, social or economic discussions. The Court is convinced that those clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the educational function of the institution.

Pet. App. B at 25-26. The court also found that each activity had an official faculty sponsor who received remuneration for the service (Pet. App. B at 22-23) and that all clubs were subject to an official policy under which the school administration retained control over the activity (Pet. App. B at 19-20).

In sum, the court of appeals simply disregarded as irrelevant the trial court's findings on the degree of faculty sponsorship of the Westside High School student activities program and instead adopted its own bright line rule in which an activity is deemed to be curricular only if the activity corresponds to specific classroom subject matters. This construction flatly contradicts the structure, purpose, and legislative history of the statute.

B. The EAA Does Not Require Public Secondary Schools To Become Limited Open Forums.

The EAA does not force schools to become limited open forums, and Congress did not envision that public forums would be created in all schools. Senator Hatfield stated:

> [A] school retains control over the programs of that school, the activities of that school, the student body of that school. . . .
>
> We are not directing the school to set up such a forum. We are merely recognizing that schools do have them in many instances. Not all, as some schools do not have these open forums. For those that do have, what we are saying is that once this school establishes that forum, . . . it should not discriminate as to the content of the speech in that forum.

130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).[6] The Senate Committee Report states that the

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5. As the district court in *Garnett* stated:

> A school board . . . may determine that there is high student interest in a chess club, that it would be a good companion to a mathematics course, that such a club meets instructional goals, and as a result adopt it as part of the curriculum. The process of designing a curriculum of academic and nonacademic elements to meet educational objectives and foster student interest in the school and its courses of study is the prerogative of educators with their expertise and circumspection.

Garnett v. *Renton School Dist. No. 403*, 675 F. Supp. 1268, 1273 (W.D. Wash. 1987), *aff'd*, 874 F.2d 608 (9th Cir. 1989).

6. *See also* 130 Cong. Rec. S8357 (daily ed. June 27, 1984) (statement of Sen. Durenberger) ("The Equal Access Act retains local school board control over its schools. The school board determines whether it will create a limited

aim is to allow "students to engage in religious speech during extracurricular hours, if other students are allowed to engage in non-religious speech." S. Rep. 357, 98th Cong., 2d Sess. 2379 (1984).

The court of appeals misunderstood this fundamental aspect of the statute because it mistakenly believed that an expansive interpretation of "noncurriculum related" was necessary to prevent circumvention of the statute "by administrative decree" (Pet. App. A at 14). The goal of the statute, however, was not to license student expression—religious or otherwise—or to restrict school discretion in establishing a limited open forum. *See* 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984) (statement of Sen. Hatfield). As stated above, the statute's aim was to require a policy of nondiscrimination based on the content of the expression where the school had elected to allow student-initiated expression free of faculty sponsorship or direction. *Id.* The trigger for establishing that forum was left entirely in the hands of the school administration. Congress did not create, nor did it intend to create, a laundry list of the types of student activities which schools could not include in their curricula at the risk of establishing an unwanted open forum.[7]

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open forum by allowing student-initiated groups to meet on school premises."); 130 Cong. Rec. S8338 (daily ed. June 27, 1984) (statement of Sen. Dixon) ("The amendment specifies that the equal access provision would be applicable only in cases where a school generally allows nonreligious student groups to meet during noninstructional time."); 130 Cong. Rec. H7738 (daily ed. July 25, 1984) (statement of Rep. Darden) ("[The bill] retains local school board control over school activities by allowing local officials to decide whether, when, and how all groups may use school facilities. . . .").

7. The broad discretion of the schools to determine the content of their curricula has been recognized repeatedly by this Court. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *University of California Regents* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.). Thus, this Court has affirmed the school's authority over nontraditional forms of education such as student newspapers (*Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.")) and student body elections assemblies (*Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 683 (1986)).

The proper judicial role has nothing to do with policing school district policies to prevent circumvention of the Act since Congress expressly reaffirmed the right of school districts to establish open forums if they wished or to terminate those already in existence. There is no statutory policy favoring access by religious clubs to student activities programs; the statutory policy is simply one of nondiscrimination if the school elects to establish a forum. The courts play no role in that election other than to assure that the school's classification is consistent with the statutory criteria and not an abuse of discretion.

Curricular activities can take the form of formal or nonformal education, in or out of a classroom, using traditional textbooks or nontraditional methods such as electronic media. Surely, when a school offers after-hours "mini-courses," internships or work-study to accommodate students' specialized needs or interests, it is not operating outside what it sees as its curricular mission. To hold otherwise would have a chilling effect on the school's willingness to experiment with nontraditional or nonformal education, however innovative or beneficial to students.

C. The Westside High School Activities Program Does Not Establish An Open Forum.

The legislative history of the EAA indicates that Congress modeled the statute on the First Amendment right of access recognized in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Congress, in the EAA, sought to extend the *Widmar* rule, which is applicable to public universities, to public secondary schools. Nothing in the statute, however, alters the principle in *Widmar*, 454 U.S. at 267-70, and *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 47 (1983), that the establishment of an open forum is the result of a voluntary act by the school authorities which those authorities also may discontinue. Indeed, Senator Hatfield explained in floor debate that Congress, in drafting the EAA, "used the phraseology that has been used by the courts and educational institutions to circumscribe what would be called a limited forum. We have used the

term 'limited forum' borrowing that from the courts." 130 Cong. Rec. S8342 (daily ed. June 27, 1984). Under the EAA, *Widmar* applies to the Westside High School only if the high school, like the university in *Widmar*, established a public forum.

The Court in *Widmar* reviewed findings that a state university had enacted a policy of "accommodating" student groups (454 U.S. at 267), and recognized more than 100 such groups. On these facts, it concluded that the university had created a limited open forum, and thus was required to show a compelling interest for excluding a religious student group from access to school facilities. *Id.* at 269-70.

The Ninth Circuit in *Garnett* v. *Renton Area School District No. 403*, 874 F.2d 608 (9th Cir. 1989), used the same analysis, but distinguished *Widmar* on its facts. It made a specific inquiry into the facts and circumstances surrounding a school administration's policy that only "[c]lubs which were an extension of the courses and programs of the district are permitted to meet" (*Garnett*, 874 F.2d at 613), and found, on the basis of the specific factual record before it, that the school's policy "does not discriminate on an impermissible basis, nor is it irrational. Nor do we find that the district has been disingenuous in the application of the policy." *Id.*[8] In particular, it found that the degree of faculty involvement, direction and supervision was such that the activities would not be deemed student-initiated or student-directed. *Id.* at 614.

In the present case, as well, review of the record shows the facts to be wholly distinguishable from those of *Widmar*. The district court made numerous findings on the extent of faculty participation and supervision, as well as each activity's role in furthering the school's curricular goals. Pet. App. B at 20-23.

8. The court's review of the school's determinations was not *de novo*, since such review, it believed, would invite litigation every time a student group was denied a classroom, and, in any event, is not necessary to effectuate the purposes of the EAA. *Garnett*, 874 F.2d at 613-14. It noted that courts have deferred to school authorities' broad discretion in shaping the school environment and that the EAA does not expressly depart from this principle. "Congress must, therefore, be understood to have legislated in light of this principle." *Id.* at 614. The court found nothing in the legislative history to contradict this interpretation.

Both *Widmar* and the EAA require a case-by-case analysis to ensure that schools have properly balanced the competing constitutional interests without supplanting or severely curtailing the traditional responsibility of school authorities to manage their schools and define their educational goals. The Eighth Circuit's laundry list approach, by contrast, fails to take into account the unique factual circumstances of a particular school's curricular mission. Such an approach "make[s] the EAA meaningless" (Pet. App. A at 12) only insofar as the language of the Act itself and the lengthy legislative history stress repeatedly that the Act does not force a school to become a forum where none is intended.

II.

THE COURT OF APPEALS' CONSTRUCTION OF THE EAA UNNECESSARILY RAISES CONSTITUTIONAL CONCERNS UNDER THE ESTABLISHMENT CLAUSE.

The construction of the EAA which we urge offers the additional advantage of avoiding unnecessary constitutional concerns. This Court has repeatedly favored a fair construction of a federal statute which avoids serious doubt about the statute's constitutionality to one which raises serious constitutional doubt. *See, e.g.*, *Public Citizen* v. *Department of Justice*, 491 U.S. ___, 109 S. Ct. 2558, 2572 (1989); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979). The court of appeals, on the other hand, disregarded that "cardinal principle" (*Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)) and instead adopted a construction that unnecessarily required the court to address the constitutionality of the EAA under the Establishment Clause.

We are satisfied that the statute is not unconstitutional on its face, since it can be applied in a manner consistent with all three First Amendment clauses involved in this case. If a school district truly establishes a limited open forum, no serious constitutional objection can be raised when a student group exercises its right of fair access to the school's student activity program for such non-religious activities as Young Democrats or Young Republicans, Boy Scouts, 4-H, or Future Farmers of America. We are also

satisfied that even a student religious group may obtain access to a public secondary school student activities program which is wholly free of official sponsorship and direction without raising Establishment Clause concerns. That is the issue this Court settled in *Widmar*.

The court of appeals in this case, however, as noted above, overlooked the crucial factual distinction between *Widmar* and this case, which the district court correctly identified as dispositive—that is, that the Westside High School student activities program is not free of official sponsorship and direction. *See* Pet. App. B at 21-23.[9] The involvement of paid faculty sponsors and official direction and control of all student activities at Westside High School presents very different circumstances from the forum in *Widmar* which the university opened for use by student groups. *See Widmar*, 454 U.S. at 273. There was no risk that the religious group seeking access to the university facility in *Widmar* would be perceived as officially sponsored because there was no reason to believe that other nonreligious activities using the forum received official approval. *Id.* at 274.

If the court of appeals had construed the eligibility standard for equal access under the statute by reference to the degree of official sponsorship or involvement in the existing activities as the legislative history calls for, there would be no risk of perception that any noncurriculum-related student activity, including student religious groups, enjoyed faculty sponsorship. Given the absence of any reasonable perception of official endorsement of student activities, there would be no basis for Establishment Clause concern. *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. ___, 109 S. Ct. at 3101; *Lynch* v. *Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

A different case is presented where, as here, faculty sponsorship and control of student activities is the norm. The court of appeals

9. The only distinction acknowledged by the court of appeals was the fact that *Widmar* involved a public university and the EAA concerns public secondary schools. The court determined this difference to be of no consequence. Pet. App. A at 19. It would be unnecessary for this Court to address the constitutional significance of that difference under our construction of the EAA.

believed this arrangement did not prevent the establishment of a limited open forum to which student religious groups were entitled to equal access. Pet. App. A at 14-15. But in this circumstance, students are accustomed to associating the activities program with official approval and direction. Therefore, the risk of reasonable inference[10] that a religious activity enjoys the same official imprimatur as other student activities is not insignificant and presents substantial constitutional concerns. *County of Allegheny*, 492 U.S. ___, 109 S. Ct. at 3086; *Lemon* v. *Kurtzman*, 403 U.S. at 612-13.

The statute, of course, is concerned with "equal access" for religious groups—that is, access for religious groups on the same terms and conditions as other student groups. A secondary school can avoid such Establishment Clause problems only when a truly open forum is maintained at the school, meaning that no student could reasonably perceive that the school sponsored or promoted either a student religious group or a nonreligious group.

The evidence in this case is undisputed that the student religious group here is not seeking equal access to the forum open to all other student clubs, but a different form of access free of faculty direction and guidance applicable to all other student activities. In such a case, the benefit to religion is more than incidental and raises serious Establishment Clause concerns by allowing the student religious group to obtain access on terms available to no other group. *See Widmar*, 454 U.S. at 275-76.

Most importantly, when Westside High School refused to sponsor the student religious group as an approved student activity, the school was denying the students neither their First Amendment right of free speech (*see Tinker* v. *Des Moines School Independent Community District*, 393 U.S. 503, 506-07 (1969)) nor their First Amendment right to freely exercise their religious beliefs (*see Wallace* v. *Jaffree*, 472 U.S. 38, 67 (1985)

10. A mere "reasonable inference" that Westside High School supports a student religious group is sufficient to raise Establishment Clause questions. *See Widmar*, 454 U.S. at 274, n.14. *Cf. Hazelwood*, 484 U.S. at 271 (holding that the educator may exercise authority over student publications which "might reasonably perceive to bear the imprimatur of the school.").

beliefs (*see Wallace* v. *Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring)). The students, in fact, *had* been meeting informally without school interference to conduct the very activity they demanded that Westside High School approve. Whether students may engage in prayer, either individually or in groups, is simply not the issue pursued by the students in this case. It is clear that the students seek the stamp of official approval of their religious activity by Westside High School. The Eighth Circuit's decision in essence forces Westside High School to give such approval to the student religious group.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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